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MAJLIS PEGUAM MALAYSIA v. HARI KRISHNAN JEYAPALAN

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
PRASAD SANDOSHAM ABRAHAM JCA
B ASMABI MOHAMAD JCA
[CIVIL APPEAL NO: A-02(A)-16-01-2016]
23 NOVEMBER 2016

C ***LEGAL PROFESSION:*** *Professional discipline – Misconduct – Advocate and solicitor acted for client in recovery of sum – Arrangement that debtor will pay total amount owing to client in monthly instalments through lawyer's firm – Cheques drawn from client's account dishonoured – Disciplinary committee found advocate and solicitor guilty of misconduct – Advocate and solicitor struck off from Roll – Whether punishment appropriate – Whether offence proportionate with sentence* D *meted out – Whether formal charge should be preferred against advocate and solicitor before commencement of disciplinary proceedings – Legal Profession Act 1976, s. 103*

The complainant appointed the respondent, an advocate and solicitor, to recover a sum of RM59,000 from one Ariasamy. An agreement was later reached between the parties that Ariasamy will pay the total amount in E monthly instalments to the complainant through the respondent's firm. However, the last three cheques issued by the respondent to the complainant were dishonoured, of which two were drawn on the respondent's client account. The complainant lodged a complaint to the disciplinary board ('the DB') that (i) Ariasamy had paid the respondent RM35,000 but the F respondent had only paid the complainant RM28,500; and (ii) despite requests, the respondent did not pay the complainant the remaining balance. The DB sought a written explanation from the respondent but the respondent failed to furnish the same. The DB later received a letter from the complainant, stating that he wished to withdraw his complaint against the G respondent as it was he who had instructed the respondent's clerk to stop payment on the cheques in order to collect cash from the respondent. However, the disciplinary committee ('the DC') found the respondent guilty of misconduct. Upon receiving the DC report, the DB sought the view of the Bar Council ('the appellant') and the appellant decided to intervene. The appellant issued a notice under s. 103D(2), (4) and (5) of the Legal Profession H Act 1976 ('the LPA') to the respondent. Since the respondent was absent for two times, the DB proceeded with its deliberation and ordered the respondent: (i) to make restitution to the complaint in the amount of RM3,800 within a month; and (ii) be struck off the Roll of the Advocates and Solicitors ('the Roll'). The respondent filed an appeal to the High Court I against the decision of the DB and the appeal was allowed; the order of the DB was set aside. Hence, the present appeal. The issues that arose for the court's determination were (i) whether a formal charge should be preferred

against the respondent before the commencement of the disciplinary proceedings; and (ii) whether the punishment meted out by the DB was proportionate with the respondent's misconduct.

Held (allowing appeal; setting aside order of High Court)
Per Prasad Sandosham Abraham JCA delivering the judgment of the court:

(1) There was no necessity for preferment of formal charges against the respondent and this issue should be put to rest. The relevant provisions of the LPA in relation to disciplinary proceedings are clear and express and make no provision for the preferment of formal charges against the respondent. Upon careful perusal of s. 103B(4)(a) and (b) of the LPA, the investigation committee's role is inquisitorial in nature and the rights of the respondent are well-provided for. Subsection (4)(a), (b) of s. 103B of the LPA particularly provides the DC, before it commences its hearing, to deliver to the respondent a copy of any written application or complaint and statutory declaration in support of it and inviting the respondent to forward a written explanation to the DC. This subsection also preserves the right of the respondent to be heard if he so desires. Since the regime of the LPA in relation to disciplinary proceedings is clear, there is no necessity for the courts to import doctrines of natural justice into the interpretation of such provisions. (paras 14-17)

(2) The DB failed to take into account the principles of proportionality in arriving at its decision. Even though the dishonoured cheques issued directly from the respondent's client's account was a serious offence, the fact that the complainant withdrew his complaint must also be taken into account. Looking at the offence, for the purposes of sentencing the respondent, right-thinking members of the DB should consider and deliberate on the mitigatory factors presented before it meted out the appropriate punishment. In a situation where punishment ranges from reprimand and/or striking out from the Roll, before deciding the appropriate punishment to be meted out, it would be expected of right-thinking members of the DB to consider (i) the gravity of the offence; (ii) the exculpatory conduct of the respondent; and (iii) the conduct of the complainant since lodging the complaint. (para 21)

(3) Striking the respondent out from the Roll of the appellant was manifestly harsh. Most of the sum to be collected by the respondent for the complainant had been done so and had been paid out to the complainant. All that remained was a sum of RM2,000. In the given circumstances, a more appropriate sentence would be a fine rather than striking out the respondent from the Roll. (para 19)

Bahasa Malaysia *Headnotes*

Pengadu telah melantik responden, seorang peguam bela dan peguam cara, untuk mendapatkan semula RM59,000 daripada seorang bernama Ariasamy. Satu persetujuan dicapai antara pihak-pihak bahawa Ariasamy akan membayar jumlah keseluruhan kepada pengadu secara ansuran bulanan melalui firma responden. Walau bagaimanapun, tiga cek terakhir yang dikeluarkan oleh responden kepada pengadu tidak laku dan dua daripadanya dikeluarkan daripada akaun anak guam responden. Pengadu mengadu kepada lembaga tatatertib ('LT') bahawa (i) Ariasamy telah membayar responden sejumlah RM35,000 tetapi responden hanya membayar pengadu sejumlah RM28,500; dan (ii) walaupun berulang kali diminta, responden tidak membayar pengadu jumlah baki. Lembaga tatatertib meminta penjelasan bertulis daripada responden tetapi responden tidak mengemukakannya. Lembaga tatatertib seterusnya menerima sepucuk surat daripada pengadu, menyatakan dia berhajat menarik balik aduannya terhadap responden kerana dia sendiri yang sebenarnya mengarahkan kerani responden menghentikan bayaran cek supaya dia boleh menerima wang daripada responden secara tunai. Walau bagaimanapun, jawatankuasa tatatertib ('JT') mendapati responden bersalah kerana salah laku. Setelah menerima laporan JT, LT meminta pandangan Majlis Peguam ('perayu') dan perayu memutuskan untuk mencelah. Perayu mengeluarkan notis bawah s. 103D(2), (4) dan (5) Akta Profesion Undang-Undang 1976 ('APU') kepada responden. Oleh kerana responden tidak hadir sebanyak dua kali, LT terus membuat pertimbangan dan memerintahkan responden: (i) membuat restitusi terhadap aduan berjumlah RM3,800 dalam masa sebulan; dan (ii) disingkirkan daripada Daftarai Peguam Bela dan Peguam Cara ('Daftarai'). Responden memfailkan rayuan kepada Mahkamah Tinggi terhadap keputusan LT dan rayuan ini dibenarkan; perintah LT diketepikan. Maka timbul rayuan ini. Isu-isu yang timbul untuk pertimbangan mahkamah adalah (i) sama ada pertuduhan rasmi sepatutnya dikemukakan terhadap responden sebelum bermulanya prosiding tatatertib; dan (ii) sama ada hukuman yang dijatuhkan setara dengan kesalahan yang dilakukan oleh responden.

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi)
Oleh Prasad Sandosham Abraham HMR menyampaikan penghakiman mahkamah:

(1) Tiada keperluan untuk mengemukakan pertuduhan rasmi terhadap responden dan isu ini patut diselesaikan. Peruntukan-peruntukan relevan dalam APU berkaitan prosiding tatatertib jelas dan tidak memperuntukkan tentang pengemukaan pertuduhan rasmi terhadap responden. Penelitian s. 103B(4)(a) dan (b) APU menunjukkan bahawa peranan jawatankuasa penyiasatan bersifat inkuisitorial dan hak-hak responden ada diperuntukkan. Sub-seksyen (4)(a) dan (b) bagi s. 103B APU dengan khususnya memperuntukkan sebelum memulakan

perbicaraan, JT perlu menyampaikan kepada responden satu salinan permohonan bertulis atau aduan dan akuan berkanun yang menyokongnya dan meminta responden mengemukakan penjelasan bertulis kepada JT. Subseksyen ini juga memelihara hak responden untuk dibicarakan jika dia mahu. Oleh kerana rejim APU berkaitan prosiding disiplin adalah jelas, tiada keperluan untuk mahkamah mencedok masuk doktrin keadilan asasi dalam tafsiran peruntukan-peruntukan sedemikian.

(2) Lembaga tatatertib gagal mengambil kira prinsip keseimbangan dalam membuat keputusannya. Walaupun tindakan mengeluarkan cek-cek tidak laku daripada akaun anak guam responden adalah salah laku serius, fakta pengadu menarik balik aduannya mesti diambil kira. Melihat pada kesalahan, bagi maksud hukuman responden, ahli-ahli LT yang berfikiran wajar sepatutnya mempertimbangkan faktor-faktor mitigasi yang dikemukakan sebelum menjatuhkan hukuman sesuai. Dalam situasi hukuman pelbagai iaitu bermula daripada teguran hinggalah penyingkiran daripada Daftarai, sebelum memutuskan hukuman yang sesuai dijatuhkan, ahli-ahli LT yang berfikiran wajar dijangka mempertimbangkan (i) keseriusan kesalahan; (ii) tindakan yang membebaskan responden; dan (iii) perilaku pengadu sejak membuat aduan.

(3) Menyingkirkan responden daripada Daftarai perayu ternyata satu hukuman berat. Kebanyakan jumlah yang diterima oleh responden bagi pengadu telah dibuat dan dibayar kepada pengadu. Yang berbaki cuma RM2,000. Dalam hal keadaan ini, hukuman denda lebih sesuai berbanding penyingkiran responden daripada Daftarai.

Case(s) referred to:

Aziana Uda Bahari v. Gan Kong You [2009] 8 CLJ 438 HC ***(refd)***
Gana Muthusamy v. Tetuan LM Ong & Co [1998] 4 CLJ 878 CA ***(refd)***
Rajehgopal Velu v. Ganashalingam Rajah; Majlis Peguam Malaysia (Intervener) [2015] 8 CLJ 1202 CA ***(refd)***
Re A Solicitor [1956] 1 WLR 1312 ***(refd)***

Legislation referred to:

Legal Profession Act 1976, ss. 94(3)(c), (i), (n), 100(1)(b), (6), (9), 103B(4)(a), (b), 103D(2), (4), (5)

For the appellant - Babu Raj Raja Gopal; M/s Kean Chye & Sivalingam
For the respondent - VS Viswanathan; M/s VS Viswa & Co

[Editor's note: Appeal from High Court, Ipoh; Originating Motions No: 17D-2-04-2015 (overruled).]

Reported by Najib Tamby

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JUDGMENT

Prasad Sandosham Abraham JCA:

Introduction

[1] This appeal was heard and disposed on 12 August 2016 wherein we
B had allowed this appeal with no order as to costs, and set aside the order of the High Court on 16 November 2015 (see pp. 14-16 of RR, Part A). We further ordered that the disciplinary board's order to be substituted with a fine of RM11,400 to be paid within one month from the date of the Court of Appeal's order. The appellant now seeks to apply for leave from the
C Federal Court to appeal based on questions of law framed.

Background Facts

[2] The facts are elucidated from the pleadings, judgment of the learned judge and the submissions of respective parties.

D **[3]** The respondent is an advocate and solicitor of the High Court of Malaya practising in the Ipoh branch of Messrs Shanti Jeyapalan, Zeti Zulfah & Partners. One Savariar a/l Magalam (the complainant) appointed the appellant to recover a sum of RM59,000 from one Ariasamy a/l Anthony.

E **[4]** Having received the notice of demand, Ariasamy decided to settle the matter by paying the total amount in monthly instalments. The said instalments were arranged to be paid through the respondent's office to the complainant. However, the last three cheques issued by the respondent to the complainant were dishonoured, of which two were drawn on the appellant's clients account.

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[5] The complainant lodged a complaint *vide* letter dated 19 September 2011 that Ariasamy had paid the respondent RM35,000 but the respondent had only paid him RM28,500. Despite requests, the respondent did not pay him the balance of RM3,800.

G **[6]** The disciplinary board (DB) sought written explanation from the respondent *vide* letter dated 1 December 2011 pursuant to s. 100(1)(b) of the Legal Profession Act 1976 (LPA 1976) (Act 166). However, the respondent failed to furnish any written statement.

[7] The DB noted that the material facts as stated in the letter of complaint
H established misconduct on the part of the respondent. The respondent then was given notice under s. 100(6) and 100(9) of the LPA 1976 to appear before the DB on 16 March 2012. The respondent then had written on 15 March 2012 requesting for adjournment on medical grounds.

[8] The hearing was fixed on 13 April 2012 and the respondent requested
I that the matter be referred to a disciplinary committee (DC). The DC hearing was held on 25 October 2013. On 31 October 2013, the DB received an undated letter from the complainant stating that he wished to withdraw his

complaint against the respondent as he was the one who had instructed the respondent's clerk to stop payment on the cheques so that he could collect cash from the respondent.

[9] In view of the withdrawal letter, the DB wrote to Bar Council to inquire whether the Bar Council wanted to intervene and thus the DB deferred its deliberations pending decision of the Bar Council.

[10] The DC then found that the respondent was guilty of misconduct for the following reasons:

(a) Cheques drawn on solicitors clients' account which were dishonoured countermanded fall under s. 94(3)(c) of the LPA 1976.

(b) Gross disregard for client's interest under s. 94(3)(n) of the LPA 1976.

(c) Allowed an unauthorised person to carry out legal business of his firm without control and supervision under s. 94(3)(i) of the LPA 1976.

[11] Upon receiving the DC report, the DB sought the view of the Bar Council and the Bar Council decided to intervene on 25 April 2014. DB then issued a notice under s. 103D(2), (4) and (5) of the LPA 1976 to the respondent as well as all other parties. On 12 September 2014, the respondent was absent on medical grounds and few adjournments were given due to the respondent's absence. On 12 March 2015, the respondent was again absent and the DB continued with its deliberation and held that:

(a) The respondent to make restitution to the complaint in the amount of RM3,800 within one month;

(b) The respondent be struck off the Roll with effect from 21 days of the date of the order.

Findings

[12] The principal issue raised in this appeal is the question as to whether a formal charge should be preferred against the solicitor concerned before the commencement of disciplinary proceedings against him after the DB has decided to refer the complaint by the complainant to a DC, for further investigations.

[13] It would appear that the learned judge at first appeared to agree with the submissions of counsel for the appellant that the law does not require the preferment of charges. However, counsel for the respondent made reference to a decision of this court ie, the decision of *Rajehgopal Velu v. Ganashalingam Rajah; Majlis Peguam Malaysia (Intervener)* [2015] 8 CLJ 1202 which appears to support the proposition that preferment of charges against the respondent is mandatory. On that ground alone, the learned judge allowed the appeal and set aside the order of the DB. The learned judge then went on to consider other issues raised which were not germane for the purposes of this appeal.

[14] The Federal Court in an appeal from the aforesaid decision of the Court of Appeal reversed the Court of Appeal and the position in law in our view is clear that there is no necessity for preferment of formal charges against the respondent and this issue should be put to rest.

[15] However, we would observe that the relevant provisions of the LPA 1976 in relation to disciplinary proceedings are clear and express and make no provision for the preferment of formal charges against the respondent. In this context, we prefer the views expressed by Justice Kamardin Hashim, in *Aziana Uda Bahari v. Gan Kong You* [2009] 8 CLJ 438; [2009] 3 MLJ 495 on this point and we quote:

> [20] With regard to the applicant's contention that she was not given any specific charges before she attended meeting held by the DB, her complaint could not hold water. There is no requirement either under the Act or under the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 requiring charges to be framed against the applicant. The meeting of the DB cannot be taken as a trial by the court.

[16] We further wish to point out that upon a careful perusal of s. 103B(a) and 103B(b) of the LPA 1976, the investigation committee's role is inquisitorial in nature and the rights of the respondent are well provided for. In particular sub-s. 4(a), (b) of 103B of the said Act clearly provides the DC before it commences its hearing, deliver to the respondent a copy of any written application or complaint and statutory declaration in support thereof and inviting the respondent to forward a written explanation to the DC. This subsection also preserves the right of the respondent to be heard if he so desires.

[17] Therefore in our view, since the regime of the LPA 1976 in relation to disciplinary proceedings is clear in terms, there is no necessity for the courts to import doctrines of natural justice into the interpretation of such provisions.

[18] For the aforesaid grounds, we allowed the appeal and set aside the order of the High Court Judge. However, we felt constrained to vary the order of the DB and substitute the order for striking out from the Rolls of Advocates and Solicitors, with a fine of RM11,400 to be paid within one month from the date of the order. We were minded of the words of His Lordship Gopal JCA (as he then was) in *Gana Muthusamy v. Tetuan LM Ong & Co* [1998] 4 CLJ 878; [1998] 3 MLJ 341, a decision of the Court of Appeal and at pp. 881 (CLJ); pp. 344-345 (MLJ), wherein His Lordship said and we quote:

> It is primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honourable profession. Courts must necessarily exercise caution when entertaining an

appeal in which the central question is whether particular conduct is unprofessional and cases meriting curial interference will be rare. Otherwise it will be the court and not the profession that will determine the yardstick of professional behavior. We would, in this context express our agreement with the following passage in the Guide to the Professional Conduct of Solicitors issued by the Council of the Law Society in 1974, quoted by the learned judges of the High Court in their judgment:

> One of the hallmarks of a developed profession is that it should lay down and maintain standards of professional conduct for its members based upon the best thinking of those members as to what constitutes proper conduct for a member of that profession.

In our judgment, a court will be entitled to interfere only if what has been found by a Disciplinary Committee to be unprofessional conduct will not be considered to be such by the best thinking members of the profession. The present case does not come within the reach of that test and accordingly this appeal fails.

[19] However, on the facts of the present case, we are of the view curial intervention is called for by the court. In this case, most of the sum to be collected by the respondent for the complainant had been done so and had been paid out to the complainant. All that remained was a sum of RM2,000 and there appears to be a dispute of fact as to why the said sum of RM2,000 was being retained. In the given circumstances of the case, we find that a more appropriate sentence would be a fine rather than striking out the respondent from the Roll.

[20] In determining sentence to be imposed, the functions of the DB should as far as possible be insulated from judicial intervention as the peers of the respondent, senior members of the Bar would be the appropriate forum to meet out the appropriate sentence as provided for under the LPA 1976.

[21] However, we are of the view that the DB failed to take into account the principles of proportionality in coming to the decision that it did. Whilst we agree that the cheques dishonoured were issued directly from the respondent's client's account which by itself is a serious offence and that it is imperative that the operation of the client's account must always be with honesty and integrity. The fact that the complainant withdrew his complaint must also be taken into account. We would take the approach that looking at the offence, for the purposes of sentencing the respondent, right thinking members of the disciplinary board should consider and deliberate on the mitigatory factors presented before it before it metes out the appropriate punishment. In a situation where punishment ranges from reprimand and/or ensure to striking out from the Rolls, it would be expected of right thinking members of the DB to consider:

(a) the gravity of the offence;

(b) the exculpatory conduct of the respondent;

(c) the conduct of the complainant since lodging the complaint

before deciding the appropriate punishment meted out. By way of analogy, it is a question of where the pendulum of a clock swings ie, to the end of the range of its swing or at a very beginning of the swing. If the degree of the swing of the pendulum swings extremely to the left, then the maximum sentence should be imposed.

[22] Under the given circumstances, we are of the view striking out from the Rolls of the respondent, is manifestly harsh and any right thinking members of the DB taking into account the conduct of the respondent in this case and exercising understanding and compassion to the respondent in this particular case could not have reasonably arrived at a decision to strike out the respondent from the Rolls. This approach was taken by the English courts in the case of *Re A Solicitor* [1956] 1 WLR 1312 wherein the court set aside the order for striking out from the Rolls and substituted it with a sentence of suspension and to the judgment of Lord Goddard CJ at p. 1315 which we now set out and we agree.

> As I have said, if there was any suggestion against the professional conduct of the solicitor, we should only interfere in the most extreme cases, but the court has carefully considered the representations made on both sides and they are quite satisfied that, bearing in mind the finding of the committee that the appellant was guilty of conduct unbefitting a solicitor, which of course is not appealed against, the order is one which is too severe considering the nature of the offence which was proved. It was a shocking offence, no doubt, from a social point of view that a man should act in this way, but in one sense it is no worse in a solicitor than in anybody else and it is not an offence which can be passed over. We entirely agree that the committee did not think that they were bound to pass this particular sentence. The expression which they use is one very well known to judges and chairmen of quarter sessions; they very often say they cannot overlook the offence and must pass a certain sentence. Having given this case the fullest and most anxious consideration, we have come to the conclusion that we shall set aside the order striking off the Roll and substitute therefor a sentence of suspension for two years.

[23] We therefore ordered accordingly.